

## 4 EEOC Cases To Watch In 2023

By **Amanda Ottaway**

*Law360 (January 2, 2023, 12:03 PM EST)* -- A groundbreaking U.S. Equal Employment Opportunity Commission suit challenging an automated hiring tool that allegedly screened out older applicants tops the list of EEOC suits discrimination lawyers will be keeping tabs on in the new year.

Along with potential bias in artificial intelligence tools, pay equity is an area the EEOC has been and will remain keenly focused on, experts said. And the ongoing proliferation of state and local laws requiring employers to publish salary ranges with job listings, or share pay data at the request of a current employee, will likely spur more claims from workers and give the agency more ammunition to go after employers, said Morrison & Foerster's Andrew Turnbull.

"I think just given all these pay transparency laws of putting pay information in employees' hands, we're probably going to see more employees running to the EEOC to make claims, which will give them more of a basis to bring litigation," said Turnbull.

Here are four EEOC cases — all of which touch on key areas of interest to the agency — to watch in 2023.

### **EEOC v. iTutorGroup**

The agency issued official guidance in May on how employers can use AI without violating federal disability law. It made clear that if job applicants or employees are unfairly screened out or rated poorly by algorithmic and AI tools because of a disability, the employer is liable under the ADA "in many cases."

"I expect them to specifically be looking for an ADA case with artificial intelligence. And I will be surprised if they don't file a lawsuit in the next year or two challenging that. It's a developing issue, and it's new," said employer-side Debra Friedman, a member at Cozen O'Connor.

In the meantime, Mark Girouard, chair of Nilan Johnson Lewis' labor and employment practice, said he's keeping an eye on an age discrimination suit against an English-language tutoring company called iTutorGroup.

"I think it is significant that it is their first actual lawsuit in this space," said Girouard, referring to AI discrimination. The way the EEOC described the iTutorGroup algorithm in the complaint made it sound pretty clear-cut, he added — a tool trained to screen applicants based on their age.

"I think where the interesting and more complicated issues are going to come up is where you have an algorithm that maybe wasn't intentionally trained to screen based on age, but that has discriminatory impact. ... To some degree, this may have been low-hanging fruit, in that it was so explicitly intentional," he said.

At the same time, though, it's an indication that the EEOC is starting to stretch its legs in the AI bias world, he said.

"It's an opportunity for the EEOC to get out there and say, 'When we say we are interested in algorithmic bias, we mean it, and here is our first lawsuit in this space,'" he added.

He also noted that he thinks similar direction to the ADA guidance, but focused on age, gender and race bias by AI tools, is likely coming down the pike.

Girouard also added that the iTutorGroup case is interesting because it involves the hiring of remote workers.

"They're saying, 'We are just as interested in the recruiting of remote workers as we are in traditional brick-and-mortar workers,'" he said.

The case is EEOC v. iTutorGroup Inc. et al., case number 1:22-cv-02565, in the U.S. District Court for the Eastern District of New York.

### **EEOC v. Lacey's Place**

In August, the EEOC sued Illinois video game parlor chain Lacey's Place, accusing it of paying its female managers less than their male counterparts. That case and others like it are consistent with a continuing focus at the EEOC on rooting out pay discrimination, Turnbull said.

Lacey's Place operates over 30 gaming parlors in Illinois, according to its website, where patrons can play slot machines and video games.

All of the company's district managers had the same responsibilities, the EEOC said. But the female managers had either similar experience or more experience and education than their male counterparts, but they were still paid less. The agency alleged two male managers had starting salaries of over \$76,000 while female managers started at \$48,000 and \$62,000.

Myrna Maysonet, who represents employers as a partner at Greenspoon Marder, said that she expects to see the EEOC bring more pay bias cases in the future.

"Those cases are a little more difficult evidentiary-wise because you have to really prove that they're doing similar jobs for similar pay, and sometimes you don't have that," she said. But there are other cases where it's clear the agency has done a statistical analysis on the pay, she continued.

"Those are cases that I would kind of be looking at, because that's some type of cases we're going to see more often."

The case is U.S. Equal Employment Opportunity Commission v. Lacey's Place LLC Series Midlothian dba Lacey's Place, case number 2:22-cv-02161, in the U.S. District Court for the Central District of Illinois.

## **EEOC v. Lilly USA**

In September, the EEOC sued the parent company of Eli Lilly, alleging it illegally discriminated against older applicants for pharmaceutical sales representative positions after an executive told staffers that the company needed to hire more millennials.

Nilan Johnson Lewis' Girouard said he took note of the Lilly suit because it alleges nationwide age discrimination.

"Where I'm seeing it play out is in employers that are focused on, quote, 'early career staff' or 'early career hiring,'" he said of litigation over alleged age bias.

In the Eli Lilly case, a senior vice president for human resources said Lilly's workforce was mostly older workers and had 20% fewer millennials than the general American workforce overall.

The complaint filed in Indiana federal court against Lilly USA LLC accuses the pharmaceutical giant of violating the Age Discrimination in Employment Act, which prohibits prejudicial treatment against applicants age 40 and older.

The executive told the other company leaders that Lilly needed "to make sure that we have a workforce that is distributed ... by generation," according to the complaint.

"So there's a pretty clear statement there," said Girouard.

Lilly subsequently tweaked its hiring practices, and from April 2017 to 2021, the company favored younger candidates and hired fewer older applicants, the EEOC said.

Girouard said employers must strike a tricky balance when it comes to ensuring diversity.

"I think the difference is when you start to actually have hiring preferences," he said. "I think that that's different from saying, for example, 'We need to make sure we're sourcing candidates from a diverse range of sources. ... There are ways you can get at a balanced workforce without having an actual hiring goal or preference or quota,'" said Girouard.

The parties filed a case management plan Dec. 12, requesting that a jury trial be set for November 2024.

The case is EEOC v. Lilly USA LLC, case number 1:22-cv-01882, in the U.S. District Court for the Southern District of Indiana, Indianapolis Division.

## **EEOC v. SmartTalent**

Experts said they were seeing the EEOC focus on nontraditional employment arrangements, particularly staffing companies that essentially act as middlemen to place workers with employers.

Girouard said he's seen the agency home in on staffing companies for the technology sector in particular.

"The running theme in all of them is they're basically saying, you can't outsource discrimination to a

staffing agency, and give a staffing agency an unlawful hiring preference, and then have the staffing agency recruit folks consistent with that unlawful preference," he said.

The EEOC sued SmartTalent in Washington federal court on Aug. 5, alleging the staffing agency discriminated against female applicants by not slotting them into certain roles for its employer clients.

SmartTalent's clients would specify they wanted male workers assigned to them, writing things like "needs to be a guy," "strong dudes," "guys only," ... "2 guys — preferably young/energetic," "good solid dudes," according to the complaint.

But SmartTalent should have known better, the EEOC contended. Recruiters who raised concerns about the sex-specific requests were admonished or ignored, or told their job was to please the client, the complaint said.

Girouard also noted that when the EEOC sues a staffing agency and gets its client list in discovery, it then has access to potentially multiple companies that have made unlawful hiring requests.

"And then the EEOC has all of those employers to go after," he said. "Rather than trying to pick them off employer by employer, they can kind of use the agency's client list as the guide to their next claim."

Morrison Foerster's Turnbull said companies that work with staffing agencies should make sure the job criteria they hand over is legitimate.

"Don't be the person in the process selecting people or making decisions — better to say, this is the talent we need and this is the type of role that needs to be filled. And also, within your agreements, require them to comply with anti-discrimination laws, ensure that they have good anti-discrimination practices in place," he said.

On the flip side, staffing agencies whose clients might be making specific gender or race-based requests for workers should proactively have conversations with those clients about the potential risks of those asks, he said.

The case is EEOC v. SmartTalent, case number 2:22-cv-01102, in the U.S. District Court for the Western District of Washington.

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